**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

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| **KHADER ABRAHA** | ) | |
| Claimant | ) | |
| V. | ) | |
| | ) | |
| **ARMOUR ECKRICH MEATS** | ) | |
| Respondent | ) | Docket No. 1,067,589 |
| | ) | |
| AND | ) | |
| | ) | |
| **SAFETY NATIONAL CASUALTY CORP.** | ) | |
| Insurance Carrier | ) | |

## ORDER

The parties appealed the April 25, 2016, Award entered by Administrative Law Judge (ALJ) Rebecca A. Sanders. The Board heard oral argument on August 11, 2016.

### APPEARANCES

Jeff K. Cooper of Topeka, Kansas, appeared for claimant. Dallas L. Rakestraw of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

### RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. The parties agreed the Board may consult the entire *Guides*.[1]

[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted. The parties cannot cite the *Guides* without the *Guides* having been placed into evidence. *Durham v. Cessna Aircraft Co.*, 24 Kan. App. 2d 334, 334-35, 945 P.2d 8, *rev. denied* 263 Kan. 885 (1997). The Board has ruled against exploring and discussing the *Guides*, other than using the Combined Values Chart, unless the relevant sections of the *Guides* were placed into evidence. E.g., *Billionis v. Superior Industries*, No. 1,037,974, 2011 WL 4961951 (Kan. WCAB Sept. 15, 2011) and *Dunfield v. Stoneybrook Retirement Com.*, No. 1,031,568, 2008 WL 2354926 (Kan. WCAB May 21, 2008).

## ISSUES

This is a claim for an October 31, 2013, injury by accident. ALJ Sanders found claimant was not engaged in horseplay that resulted in his injury by accident. The ALJ awarded claimant a 7 percent functional impairment to the left lower extremity for his work-related injury. The ALJ did not grant claimant future medical treatment.

Respondent contends two co-workers observed claimant dancing shortly before or at the time of his accident. Respondent asserts claimant is not entitled to workers compensation benefits because he was engaged in horseplay at the time of his accident. Respondent, therefore, maintains it is entitled to reimbursement from the Kansas Workers Compensation Fund in the amount of $39,465.80 for all workers compensation benefits previously paid. If the Board finds claimant was not engaged in horseplay, respondent submits claimant is entitled to an award for a 7 percent left lower extremity functional impairment as opined by Dr. Adam Chase. Respondent asserts claimant failed to prove it is more probably true than not future medical treatment will be necessary and, therefore, he is not entitled to an award of future medical benefits.

Claimant contends his accident is compensable as he slipped and fell at work and was not dancing or engaged in horseplay. Claimant argues the testimony of his co-workers is not credible. Claimant asserts Dr. Pedro A. Murati is more credible than Dr. Chase and Dr. Murati's 12 percent functional impairment rating for claimant's left lower extremity injury should be used in calculating claimant's award. Claimant argues he proved his entitlement to future medical benefits. At oral argument, claimant asserted he will need future medical treatment because he has ongoing laxity in his left knee.

The issues are:

1. Did claimant engage in horseplay, thus rendering his claim non-compensable?

2. What is the nature and extent of claimant's disability?

3. Is claimant entitled to future medical benefits?

## FINDINGS OF FACT

Claimant speaks a little English and required an interpreter at his deposition and the preliminary hearing. Claimant's job was tying sausage casings. After tying a casing, he would cut off and throw excess casing in a bucket. At his deposition, claimant indicated that on October 31, 2013, while performing his job duties, he slipped on a meat casing, his feet split and he slid backward. Claimant testified the line was moving at the time of his accident. When asked if he was dancing at the time of the accident, claimant denied doing so. Claimant's shift was 3 p.m. to 3 a.m. and the accident occurred at approximately 1 a.m.

Claimant testified John Ohene and Sonya McClinton helped him up and took him to the office of his supervisor, Willie Brown. While claimant waited in the office, Mr. Brown left for about 10 to 15 minutes and interviewed witnesses to the accident. Claimant waited in the office because he could not move due to his injuries.

Claimant indicated he was working with "Sasha," "Trujan," Mr. Ohene and another person at the time of the accident. Claimant testified that he injured his left knee and right shoulder, but that his right shoulder is okay. Claimant had left knee surgery on February 17, 2014.

Trajaun Nash testified he was working on the same line as claimant on the day of claimant's accident. Mr. Nash testified he saw claimant fall and at the time of the fall, the line was stopped. He did not recall the number of the line where he and claimant were working. Mr. Nash indicated that just prior to falling, claimant was dancing and bending over to grab a bucket. He testified there was no music playing at the time. He initially gave the following testimony concerning the manner in which claimant danced:

> Q. Okay. It's kind of important. What was he doing?
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> A. He was moving his legs and his body at the same time. As he was bending over he was doing it, and that's when he slipped and fell.
>
> Q. Okay. So he's moving his arms and his legs as he's bending over, reaching into a bucket?
>
> A. Yes.[2]

Mr. Nash also testified that when claimant bent down to pick up the bucket, his feet never left the ground, and he moved his posterior to the left and right. He indicated there were casings on the floor when claimant did the splits, slipped and fell. He stated there was excess meat on the floor where claimant was standing and the meat makes the floor slick. Mr. Nash testified he wears rubber boots and has slipped, but never fallen.

Kimberly Norris, respondent's safety manager, testified she conducted Critical 5 training (training) in 2011, which claimant attended. Ms. Norris testified that in the past she communicated with claimant in English, without an interpreter. Ms. Norris testified that during the training, claimant never indicated he did not understand the training. One of the slides in the training presentation is entitled "Horseplay" and lists four examples. Dancing is not listed as one of the examples. Ms. Norris testified that she gives no other examples of horseplay when providing training and never instructed those she trained that dancing was considered horseplay. She did not know if Mr. Nash or claimant were ever told they could not dance at work. Ms. Norris indicated she concluded claimant engaged in

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[2] Nash Depo. at 15.

horseplay after speaking to Mr. Nash, Mr. Ohene and Vonnie Harriel. She did not ask Mr. Ohene or Mr. Nash to demonstrate how claimant was dancing.

Ms. Norris was questioned about an accident report completed by Mr. Brown. Ms. Norris confirmed the report listed wet floor with casings and WIP product as an unsafe condition. WIP means work in process. The last page of the report indicated corrective action was directing the sanitation company to clean the area. The accident report listed four root causes: excessive amount of raw material on the production floor; less than safe attitude, indifference; inattention while performing task; and line operator was not monitoring surroundings. Ms. Norris acknowledged Mr. Brown's report did not state dancing was a root cause of claimant's accident.

Mr. Ohene testified he runs the machines and takes care of the line. He worked with claimant on the day he slipped and fell. According to Mr. Ohene, the line was not running when claimant fell at approximately 12:10 a.m. He did not see claimant fall. Mr. Ohene testified that he and another co-worker, Sonya McClinton, helped claimant up.

Mr. Ohene testified that about 90 seconds to two minutes before the accident, he observed claimant dancing, but he was not listening to music. He described claimant's dancing as similar to marching. Mr. Ohene agreed claimant could have been trying to shake meat off his feet.

On other occasions, Mr. Ohene observed claimant dancing and told him not to do so, but never reported the incidents. Mr. Ohene could not "confirm the dancing sent [claimant] to the ground."[3] Mr. Ohene provided a written statement to respondent and indicated, "At that instance, the floor was not the best which I believe contributed to this accident."[4] He indicated the floor was always slick and had meat casings on it. Mr. Ohene testified claimant was not paying attention to the floor condition, which contributed to the accident. Mr. Ohene previously slipped on the floor because it was wet, slick and had meat and casings on it.

At the preliminary hearing, claimant gave a similar description of the accident as the one he gave at his earlier deposition. He testified he was not dancing, playing around or doing anything inappropriate when he slipped and fell. Claimant testified he is Islamic and listening to music and dancing is prohibited.

Claimant acknowledged signing a Critical 5 Safety Violation Notice indicating he was dancing at the time of the accident and that dancing and playing around is considered horseplay. Claimant testified he was told by Dally Sierra, respondent's human resources

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[3] Ohene Depo. at 13.

[4] *Id.*, Ex. 1.

manager, that if he did not sign the safety violation notice, he would be terminated. He testified that he could read the notice in English, but did not understand most of it.

Ms. Sierra met with claimant to explain to him why he was being issued a safety violation notice. She did not speak with Mr. Nash or Mr. Ohene, but reviewed their statements. Ms. Sierra indicated Ms. Norris was also present. Ms. Sierra testified that when she met with claimant, he indicated he did not agree with the safety violation notice. However, claimant did not say that he did not understand the notice. Ms. Sierra denied she or Ms. Norris told claimant he would be terminated if he did not sign the notice. She acknowledged the Critical 5 training program is 15 to 30 minutes long.

Mr. Brown testified he began filling out an accident report when claimant was brought to his office after the accident, which was around 1:15 or 1:17 a.m. Mr. Brown took a short break to tell the witnesses to the accident not to go home until he obtained witness statements from them. He then returned to the office and completed the accident report with claimant. Mr. Brown testified the information for the four root causes of the accident was provided to him by claimant. Mr. Brown indicated he gave claimant an opportunity to complete his own written statement of what happened and claimant declined, but gave no reason. When asked if the injury occurred any other way than claimant slipping on product, Mr. Brown indicated that he did not know and only knew what claimant and the witnesses said. He never asked Mr. Ohene or Mr. Nash to demonstrate how claimant was dancing. Mr. Brown never saw claimant dance. He testified that no matter how often the plant floor was cleaned, there was always some product on it.

Dr. Chase first saw claimant on January 6, 2014. Claimant reported slipping on a wet floor on October 31, 2013, and his legs split outward. A December 2, 2013, left knee MRI showed a large joint effusion and a disruption of the anterior cruciate ligament (ACL). Dr. Chase diagnosed a torn ACL.

Initially, Dr. Chase attempted non-surgical treatment, including physical therapy, and assigned temporary work restrictions. Following a February 5, 2014, examination and receiving reports from claimant of left knee instability, increasing pain and limping, Dr. Chase recommended ACL reconstructive surgery. On February 17, the doctor performed a knee arthroscopy and ACL reconstruction. The doctor also noted claimant had Grade 3 chondromalacia of the patellofemoral and lateral compartments of the knee.

The doctor opined claimant's chondromalacia was preexisting and more degenerative than traumatic in nature. It was the doctor's opinion that claimant's chondromalacia did not progress to Grade 3 in the three and one-half months between the date of his accident and the date of his surgery.

On May 8, 2014, claimant was released to work with restrictions of taking frequent breaks, including sitting and resting for 20 to 30 minutes after standing two hours. On August 28, 2014, claimant was seen by Dr. Chase and his physician assistant and was

returned to work with no restrictions. Claimant reported he was okay, could do his work with the use of a knee brace and had completed physical therapy. Dr. Chase testified that six months post-surgery, he had no concerns about claimant's recovery.

Dr. Chase saw claimant a final time on November 24, 2014. Claimant reported no pain and required no pain medication. Dr. Chase indicated claimant's chondromalacia was asymptomatic prior to surgery and was asymptomatic at the time of this visit. Dr. Chase noted claimant used a functional ACL brace at work for comfort, but it was not required. By that, the doctor testified he meant the ACL brace would not prevent claimant from again tearing his ACL. The doctor tested claimant's left knee range of motion and found it symmetric and normal. Dr. Chase also performed a Lachman test, where the ACL is tested for stability. The doctor performed a drawer test, where the knee is bent to 90 degrees, and varus and valgus stress tests, which test the collateral ligaments. The tests resulted in two positive findings – a small joint effusion and mild laxity. The doctor determined claimant reached maximum medical improvement. Follow-up visits were to be scheduled on an as-needed basis. The doctor testified over-the-counter anti-inflammatory medications could work for claimant as well as prescription anti-inflammatory medications.

Utilizing Table 64 of the *Guides*, Dr. Chase opined claimant had a 7 percent left lower extremity functional impairment. The doctor stated that his rating was based upon his diagnosis of a torn ACL and mild laxity. Dr. Chase acknowledged that in providing his rating, he did not take into consideration claimant's chondromalacia. The doctor assigned no permanent restrictions.

Dr. Murati evaluated claimant on January 14, 2014. The doctor reviewed claimant's left knee MRI and noted it showed an ACL rupture and medial meniscus tear. Dr. Murati diagnosed claimant with a left ruptured ACL, a collateral ligament strain and left patellofemoral syndrome. The doctor noted claimant had no significant preexisting injuries that would be related to his current diagnoses. Dr. Murati opined that within a reasonable degree of medical probability, his accident was the prevailing factor for his left knee conditions.

Claimant saw Dr. Murati again on December 9, 2014. The doctor's impressions were status post left knee arthroscopy with ACL reconstruction, left patellofemoral syndrome and left knee cruciate laxity. Dr. Murati testified claimant had negative Lachman, McMurray's, patellar compression and medial and lateral instability examinations and positive drawer and medial and lateral patellar apprehension examinations. Claimant had full range of motion and moderate crepitus.

Dr. Murati testified claimant's patellofemoral syndrome is arthritis of the anterior compartment of the knee and was caused by his work injury. He explained that because claimant tore his ACL, there is less stability and everything around the ACL works extra hard; in this case, the patellofemoral compartment and collateral ligament. The doctor indicated the patellofemoral syndrome was the actual probable consequence of the ACL

rupture. According to Dr. Murati, claimant did not have preexisting patellofemoral syndrome because it is arthritis and a person cannot have arthritis unless it is symptomatic. If a person is asymptomatic, he or she does not have arthritis.

Using Table 62 of the *Guides*, Dr. Murati opined claimant had a 5 percent functional impairment for left patellofemoral syndrome. Using Table 64, the doctor opined claimant had a 7 percent left lower extremity impairment for cruciate laxity. The impairments combined for a 12 percent left lower extremity functional impairment. Dr. Murati imposed permanent restrictions. Dr. Murati was not asked if claimant needed future medical treatment. His report stated, "I recommend at least yearly follow ups on his left knee in case of any complications that may ensue."[5]

The ALJ found claimant was not engaged in horseplay, stating:

> All three witnesses who testified for Respondent acknowledged, that due to the nature of Respondent's business the concrete floor is perpetually wet and slick due to waste product being present on the floor. At the time of Claimant's accident all three of Respondent's witnesses acknowledged that the condition of the floor caused or at least contributed to Claimant's slip and fall that resulted in a left knee injury. Two of Respondent's witnesses did not see Claimant slip and fall. The one witness who saw Claimant slip and fall testified it occurred when Claimant was bent over a bucket and moving his rear end from left to right. Two of Respondent's witnesses testified that bucket was three or four feet away from where Claimant fell. Claimant denies he was[ "]dancing or fooling around." Claimant's religious faith prohibits dancing.
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> Based on the testimony as to whether Claimant's alleged "dancing" resulted in Claimant's work accident, the Court finds that Claimant was not engaged in horseplay that resulted in Claimant's accidental injury. All Respondent's witnesses confirmed that the concrete floor where Claimant was working was wet and slick. Only one of Respondent's witnesses saw Claimant slip and fall at the same time he allegedly was "dancing." The Court also finds that Claimant's testimony that his religious beliefs prohibit such behavior sincere. For these reasons the [Court] finds that Claimant was not engaged in horseplay that resulted in his accidental injury.[6]

## PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that

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[5] Murati Depo., Ex. 3 at 3.

[6] ALJ Award at 7.

right depends.[7] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."[8]

**Claimant was not engaged in horseplay at the time of his work accident.**

Following extensive amendments to the Workers Compensation Act (Act) in 2011, the Act no longer begins with a statement of coverage, but with a statement of situations where coverage is "disallowed." See K.S.A. 2013 Supp. 44-501(a). In relevant part: "Compensation for an injury shall be disallowed if such injury to the employee results from: . . . the employee's voluntary participation in fighting or horseplay with a co-employee for any reason, work related or otherwise."[9]

Respondent asserts claimant engaged in horseplay by dancing. The Board disagrees for four reasons:

1. There is insufficient evidence that claimant was dancing at the time of his accident. The only witness who claimed to have observed claimant dance when he slipped and fell was Mr. Nash. Mr. Nash's testimony is inconsistent. He first indicated claimant was dancing by moving his arms and legs, but later indicated claimant's feet never left the ground and he moved his posterior to the left and right when he was bending down to pick up a bucket. Mr. Ohene saw claimant dance one and one-half to two minutes before falling, but could not attribute the slip and fall to dancing. He indicated claimant's dancing was similar to marching. Claimant testified his religion prohibits listening to music and dancing.

The ALJ found claimant's testimony sincere, and the Board concurs. The Board generally gives some deference to an ALJ's findings and conclusions concerning credibility where the ALJ personally observed the testimony. Based upon the evidence presented, the ALJ concluded claimant was not engaged in horseplay.

2. Dancing is not inherently horseplay. Dancing, in some instances, can constitute horseplay. The work environment and type of dancing have an impact on whether dancing is horseplay. Any type of dancing on an I-beam on the 30th floor of a building under construction would be horseplay. The Board finds that swaying back and forth as described by Mr. Nash, given the overall circumstances, is not horseplay.

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[7] K.S.A. 2013 Supp. 44-501b(c).

[8] K.S.A. 2013 Supp. 44-508(h).

[9] K.S.A. 2013 Supp. 44-501(a)(1).

3. Claimant's fall was caused by the slick floor, not because claimant may have been dancing. As noted above, K.S.A. 2013 Supp. 44-501(a)(1) disallows compensation when the injury to the employee results from horseplay. Claimant, Mr. Nash, Mr. Ohene and Mr. Brown all agreed the floor was always wet and slick. Mr. Brown indicated that even if the floor was recently cleaned, it would be slick. Mr. Nash and Mr. Ohene testified they had previously slipped on the slick floor. As noted above, Mr. Nash testified claimant was swaying back and forth and his feet never left the floor. If claimant was dancing according to this description by Mr. Nash, there is insufficient evidence to prove claimant's left knee injury resulted from said dancing, rather than from the slick floor.

4. K.S.A. 2013 Supp. 44-501(a)(1) states that compensation is disallowed if the injury is caused by "the employee's voluntary participation in fighting or horseplay **with a co-employee** for any reason, work related or otherwise." (Emphasis added.)

In *Bergstrom*,[10] the Kansas Supreme Court stated:

> When a workers compensation statute is plain and unambiguous, the courts must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, there is no need to resort to statutory construction.
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> A history of incorrectly decided cases does not compel the Supreme Court to disregard plain statutory language and to perpetuate incorrect analysis of workers compensation statutes. The court is not inexorably bound by precedent, and it will reject rules that were originally erroneous or are no longer sound.

In *Robinson,*[11] the Board denied compensation because Robinson engaged in horseplay. The Kansas Court of Appeals affirmed, stating:

> In 2011, the legislature excluded from coverage injuries such as Robinson's. There is no need for judicial construction to determine whether he suffered an injury "arising out of" his employment. K.S.A. 2015 Supp. 44-501b(b). The plain and unambiguous language of K.S.A. 2015 Supp. 44-501(a)(1)(E) answers the question for us: Workers compensation for Robinson's injury is disallowed because it resulted from his voluntary participation in horseplay with a co-employee for any reason.

While it is unusual that the Kansas Legislature placed language in K.S.A. 2013 Supp. 44-501(a)(1) stating horseplay must be with a co-employee, said language is plain

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[10] *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, Syl. ¶¶ 1 & 2, 214 P.3d 676 (2009).

[11] *Robinson v. Goff Motors/George-Nielson Motor Co.*, No. 113,110, 2016 WL 757789 (Kansas Court of Appeals unpublished opinion filed Feb. 26, 2016).

and unambiguous. Claimant was not engaged in horseplay with a co-employee. Therefore, his injury is compensable.

**Claimant has a 7 percent left lower extremity functional impairment.**

The Board concurs with the ALJ that claimant's patellofemoral chondromalacia, described by Dr. Murati as patellofemoral syndrome, preexisted his work accident. Dr. Chase was claimant's treating physician and opined claimant's patellofemoral chondromalacia was preexisting and more degenerative than traumatic in nature. Dr. Murati's opinion that claimant developed patellofemoral syndrome between the date of his accident and the date of his surgery, approximately three and one-half months, is speculative.

**Claimant is not entitled to future medical benefits.**

K.S.A. 2013 Supp. 44-510h contains a presumption that the employer's liability for medical expenses terminates upon maximum medical improvement. The presumption may be overcome with medical evidence that it is more probably true than not that additional medical treatment will be required after maximum medical improvement. Additional "medical treatment" does not include home exercise programs or over-the-counter medications.

At oral argument, claimant asserted he will need future medical treatment because he has ongoing laxity in his left knee. Insufficient evidence was presented to support that premise. The only medical evidence that claimant needs future medical treatment came from Dr. Murati, who recommended yearly follow-up appointments, in case any complications ensue. Dr. Chase opined follow-up visits were to be scheduled on an as-needed basis. Dr. Chase indicated claimant could use over-the-counter anti-inflammatory medications, because they worked as well as similar prescription medications. The Board places more faith in the opinions of Dr. Chase, claimant's treating physician, than Dr. Murati. Moreover, Dr. Murati did not opine, more probably than not, that claimant will need future medical treatment.

## CONCLUSION

1. Claimant was not engaged in horseplay at the time of his work accident.

2. Claimant has a 7 percent left lower extremity functional impairment.

3. Claimant failed to prove with medical evidence that he is entitled to future medical benefits.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[12] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

## AWARD

**WHEREFORE,** the Board affirms the April 25, 2016, Award entered by ALJ Sanders.

**IT IS SO ORDERED.**

Dated this ____ day of October, 2016.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Honorable Rebecca A. Sanders, Administrative Law Judge

[12] K.S.A. 2015 Supp. 44-555c(j).